In The

Supreme Court of the United States

October Term, 1976

No. 76-1715

RONALD SILETTI,

Petitioner,

–against–

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, and MELVIN GOLDSTEIN, individually, and as Executive Director of the New York City Employees' Retirement System,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. _____

RONALD SILETTI,

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v.

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, and MELVIN GOLDSTEIN, individually, and as Executive Director of the New York City Employees' Retirement System,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated March 4, 1977, docketed in the District Court on March 11, 1977, which affirmed the dismissal of the complaint of the above named petitioner.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit wrote no opinion in affirming the judgment dismissing the complaint of the petitioner herein. The judg-

ment of affirmance is printed at page 1a of the Appendix hereto.

The opinion of the District Court of the United States for the Southern District of New York (LASKER, J.) dismissing the complaint of the petitioner is reported at 401 F. Supp. 2d 162.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit is dated March 4, 1977, and it was entered on the docket in the United States District Court on March 11, 1977.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the 14th Amendment to the Constitution of the United States, in part, provides:

> "*** nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article V, section 7 of the Constitution of the State of New York provides:

> "After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

Section B3-40.0 of the Administrative Code of the City of New York in part provides:

> "Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or on his behalf in connection therewith shall be made upon the application of the head of the agency in which the member is employed, or upon the application of a member or of a person acting in his behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired. *** if such medical examination and investigation shows that any member, by whom or with respect to whom an application is filed under this section, is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith."

Section B3-39.0 of the said Administrative Code provides:

> "Medical examination of a member in city service for ordinary disability shall be made upon the application of the head of the agency in which such member is employed, or upon the application of such member or of a person acting in his behalf, stating that such member is physically or mentally incapacitated for the performance of duty and ought to be retired, provided that such member has had ten or more years of city-service and was a member or otherwise in city-service in each of the ten years next preceding his retirement. If such medical examination shows that such member is physically or mentally incapacitated for the performance of duty and ought to be retired, the medical board shall so report and the board shall retire such member for ordinary disability not less than thirty nor more than ninety days after the execution and filing of application therefor with the retirement system."

QUESTION PRESENTED

Did the respondent's administrative determination denying the petitioner's application for accident disability retirement benefits, and directing that he shall be retired for ordinary disability which is not causally related to his work as an employee of a City agency, with lesser

monetary retirement benefits, without holding an evidentiary hearing of disputed medical and non medical factual issues whether the petitioner's work as an employee of a City agency accidentally caused the disability for which he was retired, unconstitutionally deprive the petitioner of his property without procedural due process of law, and violate section 1 of the Fourteenth Amendment to the Constitution of the United States?

The above Federal constitutional question is presented by appropriate allegations in paragraphs 19, 23 and 28 of the complaint, which are printed at pages 21, 22 and 23 of the record below.

STATEMENT OF THE CASE

The Facts

Petitioner, born December 12, 1942, was appointed a Transit Patrolman in the employ of the New York City Transit Authority, on June 21, 1965, and he joined the New York City Employees' Retirement System. He worked until November 2, 1970, when the retirement System retired him for ordinary disability, not caused by any accident on the job (5; 18-20; 34).

Petitioner's disability began on October 2, 1969, while he was working as a Transit Patrolman, when he was found unconscious at the bottom of stairs in the subway (36).

An ambulance brought him to Elmhurst City Hospital where he remained one week after which he was discharged, with a diagnosis (36):

"Cerebral Concussion
Abrasion and hematoma of forehead
Hematoma of scalp
Multiple contusions & abrasions of hands, left elbow & lower lip."

An electro encephalogram and x-rays taken at the hospital showed no abnormalities (36-38).

Petitioner's medical history, taken at the hospital, showed no history of rheumatic fever, diabetes, epilepsy, or any neurological disorder (36). He was not taking any medication prior to this incident (36). He had worked steadily as a Transit Patrolman from June 21, 1965, to October 2, 1969 (39).

On October 29, 1969, petitioner was examined by Dr. Charles O. Fiertz, a consulting neurologist employed by the Transit Authority, who wrote a report on October 31, 1969, reading, in part (40):

> "Opinion: If the history obtained is correct, this man just simply passed out and fell down the stairs. I am unable to give any definite explanation or reason for this blackout. I doubt that it is neurological in any way, but it is conceivable that having to climb up and down stairs from one side of the station to the other during the entire length of his tour of duty, in view of his obesity his heart just simply gave out for a moment. I might suggest a vascu-study and a checkup for possible hypoglycemia.

> Conclusion: If medical studies do not give a clear answer, I do not see why the man could not go back to work with the advice that he lose weight and that he report to the clinic any episode of blackout, faintness, etc."

Petitioner returned to work as a Transit Patrolman, and worked until January 13, 1970, when he fell again, while on duty, according to a report by Transit Sergeant Edmund P. Dethman, who wrote (42-43):

> "Officer was standing on said platform and passed out - Officer fell to the platform causing injury to his nose, mouth and right hand. Officer later stated 'I don't know what caused me to collapse.'"

Petitioner was admitted again to Elmhurst City Hospital which discharged him on January 16, 1970, and wrote (44):

> "this man was admitted with a history of black-out, two times in three months time. Cerebral Spinal Fluid pressure was 240, protein 55. Brain Scan - inconclusive. EEG - diffuse bilateral dysfunction. Angiogram and repeat EEG to be done as out patient."

Dr. Fiertz examined the petitioner again on May 20, 1970, and he wrote a second report on May 22, 1970, reading, in part (48):

> Discussion: The facts in this case are simple and clear, but their interpretation offers considerable difficul-

ties. This 27-year old man has within three months had two sudden blackouts without any previous history of any disease which could result in such phenomena. According to his own report and the scant data in the chart available to me, he had four EEGs, one of which is reported from the Elmhurst General Hospital as showing diffuse bilateral dysfunction; the others are said to have been negative. Unfortunately this positive report is not very useful, if it indicated convulsive disorder it would be more specific (slow waves or spike-and-dome pattern or unspecific localization). 'Dysfunction' as such is useless for diagnostic purposes. It might equally well indicate residuals of an encephalitis or the result of a toxic poison. For practical and working purposes, however, epilepsy is the most likely diagnosis. The two patrolmen who met him at the time of the second episode should be questioned on that point. Perhaps a sleeping EEG or one done after provocation, such as saline injection, might give a more specific answer and determine any possible treatment. An angiogram might also be helpful in determining the etiology of the spells.

Opinion: In answer to the questions of Mr. Ragusen I submit the following opinion. The present physical condition of the patient is good as far as can be determined by clinical examination, but the potentiality for further blackouts is present and cannot be ruled out at the present state of

our knowledge. There is no evidence which points to any causal relationship to his work, and none must be assumed until a more specific diagnosis can be made. It is obvious that this man is not fit to either carry a gun or work around tracks."

Dr. Herman Goodman, a neurologist, examined the petitioner on May 18, 1970, and he wrote a report on May 22, 1970, reading, in part (46; 47):

> "On 10/2/69, while at his job, the patient tripped and fell down a flight of steps. He was rendered unconscious and taken to the Elmhurst General Hospital and remained there for one week. He was unable to work for about six weeks. ***
>
> ***
>
> On 1/13/70 he suddenly lost consciousness and was hospitalized for a few days. The patient has not worked since 1/13/70. His present symptoms are headaches, dizziness, back pain and insomnia. The back condition is not evaluated by me. The examination reveals tremor of the fingers but no focal neurologic signs. It is my opinion that the patient has a post concussion syndrome. The episode of 1/13/70 is related to the accident of 10/2/69. The patient has a considerable causally related disability at present and is unable to engage in his regular work."

Dr. David Eisenberg, another neurologist, examined the petitioner on August 31,

1970, and he wrote a report on September 10, 1970, reading, in part (49):

> "An EEG was taken on August 31st. The tracing reveals a background pattern containing alpha activity of 8 w/sec. and some low voltage fast activity. Throughout the tracing the occurrence of scattered 5 to 6 w/sec. theta activity is noted, from different areas at different times. There was an increase of theta activity on hyperventilation. The impression is of a slightly and diffusely abnormal EEG.
>
> It was my initial impression that he had sustained a cerebral concussion on October of 1969. I thought the EEG abnormality related to that injury. I felt he might be suffering from post-traumatic seizure disorder."

Dr. Salvatore Equale, employed by the Transit Authority, examined the petitioner in the hospital on October 4, 1969, and he wrote a report, reading, in part (36):

> "My impression is that Ptlmn Siletti suffered a Cerebral Concussion after Syncope and that this is service connected."

Dr. Jacob L. Oberman, employed by the Transit Authority, examined the petitioner on February 11, 1970, and wrote, in part (41):

> "Chest x-ray reveals horizontal heart. The blood sugar is 125 milligram per cent. The EKG reveals changes consistent with a horizontal heart, but no evidence of myocardial damage or cardiac arrhythmia.

> The employee is able to continue full work as a Transit Patrolman.
>
> Reexamination at Clinic #4 on 2-11-70, primarily for check on weight. The employee has been advised to lose 50 pounds. Lost time. Service connected. No permanent disability."

Two reports of examination of the petitioner by Dr. Behr, employed by the Transit Authority, stated that his condition was not service connected (44-45).

Upon the aforesaid medical reports, without an administrative evidentiary hearing, the Retirement System granted the application of the Transit Authority for ordinary disability retirement of the petitioner and it retired the petitioner for ordinary disability, not causally related to any accident while at work as a Transit Patrolman, effective November 2, 1970. A report by its own Medical Board, dated August 20, 1970, stated in part (34):

> "On the basis of a report from Dr. Charles O. Fiertz, Borough of Manhattan, dated May 22, 1970, in which he states that epilepsy is the most likely diagnosis, the Medical Board certifies that member is incapacitated for the performance of duty and that he should be retired on account of ordinary disability.
>
> Diagnosis: Epilepsy
> The Medical Board desires to reexamine Mr. Siletti at the end of one year."

On August 26, 1970, petitioner applied to the Retirement System for accident disability retirement on three-quarter pay, amounting to about $9,000 per annum. Without an administrative evidentiary hearing, on January 25, 1971, the Retirement System denied petitioner's application for accident disability retirement (20).

Since November 2, 1970, petitioner has been paid an ordinary disability retirement allowance of about $4,000 per annum, instead of an accident disability retirement allowance of about $9,000 per annum (20).

On February 16, 1971, the Workmen's Compensation Board made the following decision on petitioner's application for Workmen's Compensation (35):

> "DECISION: Case was continued. Average weekly wage ($210.60 payroll. Claimant has continuing causal related disability (2/3 disability)."

Proceedings in Courts Below

Petitioner filed his complaint in the District Court on March 19, 1975 (2).

Without serving an answer, on April 17, 1975, respondent made a motion to dismiss the complaint, on several grounds, pursuant to Rule 12(b)(1) and 12(b)(6), F.R.C.P. (26).

Petitioner made a cross-motion pursuant to Rule 19, F.R.C.P., to add as a party defendant Melvin Goldstein, individually, and as Executive Director of the Retirement System (27).

On September 30, 1975, the District Court (LASKER, J.) granted petitioner's cross-motion to add Melvin Goldstein as a party defendant, and it dismissed the complaint for legal insufficiency, on the ground that the petitioner's complaint did not show any need for an administrative evidentiary hearing (15-16).

Petitioner appealed to the United States Court of Appeals for the Second Circuit, which affirmed the dismissal of the complaint, by an order and judgment dated March 4, 1977, and docketed in the District Court on March 11, 1977.

Prior State Court Litigation

In 1971, petitioner sued the Retirement System in the New York Supreme Court to review its administrative determination retiring him for ordinary disability, and denying his application for accident disability retirement. On January 26, 1972, that Court remanded the

case to the Retirement Board for reconsideration in the light of the Workmen's Compensation Board decision that the petitioner has a continuing causally related disability (20-21; 29).

Upon such remand, the Retirement System, without an evidentiary hearing, on August 23, 1973, again denied petitioner's application for accident disability retirement (21).

REASONS FOR GRANTING THE WRIT

Due process of law generally requires consideration of the private interest that will be affected by official governmental action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards, and the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. Mathews v. Eldridge, 424 U.S. 319, 335 (1975); Goldberg v. Kelly, 397 U.S. 254, 263-271 (1970).

A. Petitioner's Private Interest Affected by Governmental Action

Petitioner's private interest that was affected by the respondent's official action is his claim to the greater monetary retirement benefit that would be payable to him upon his retirement for accident disability (approximately $9,000 per annum), as against the lesser

monetary retirement benefit (approximately $4,000 per annum) that has been paid to him by the respondent based upon its administrative determination, without an evidentiary hearing, that the disability for which the respondent retired him was not caused by an accident at work as a patrolman employed by the Transit Authority.

The provision in Article V, section 7 of the Constitution of the State of New York that membership in a retirement system for employees of the State and its civil divisions shall be a contractual relationship whose benefits shall not be impaired, gave the petitioner a property interest in having his application for accident disability retirement benefits determined administratively by constitutionally adequate procedural due process, Board of Regents v. Roth, 408 U.S. 564 (1971); and it entitled him to "some kind of notice and * * * some kind of hearing" upon such application. Goss v. Lopez, 419 U.S. 565, 579 (1975).

In this case, the respondent did not give the petitioner any advance notice of the medical reports and other reports to which it gave consideration, and on which it based its administrative determination that the disability for which it retired the petitioner was not caused by an accident at work as a patrolman employed by the Transit Authority; and the respondent did not give the petitioner an opportunity to participate in any kind of an administrative hearing conducted by it, before or after it made such ad-

ministrative determination; and thereby the respondent unconstitutionally deprived the petitioner of his property without procedural due process.

The District Court's decision quoted from Richardson v. Perales, 402 U.S. 389, 406 (1971), the "traditional and ready acceptance of the written medical report in social security disability cases."

In the Perales case, supra, the Court sustained an administrative hearing officer's ruling receiving in evidence a medical report in the absence of the physician who made it, because:

> "the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician." (402 U.S. at 402).

In this case, unlike the Perales case, supra, the respondent did not conduct any evidentiary hearing, before or after it denied the petitioner's application for accident disability retirement. Therefore, the petitioner never had an opportunity to cross-examine Dr. Fiertz, the Transit Authority's consulting physician, on whose report and opinion the respondent and its Medical Board based their determination that the petitioner had epilepsy, and that it was not caused by an accident at work as a patrolman employed by the Transit Authority.

Petitioner also had no opportunity to cross-examine Dr. Behr, employed by the Transit Authority, whose reports that the petitioner's injuries were not service connected were also considered by the respondent (44-45).

While the decision in Richardson v. Perales, supra, also said that courts have "uniformly recognized reliability and probative value" of medical reports (402 U.S. at 405), this was preceded by statements that "there is no inconsistency whatever in the reports of the five specialists", and that Perales did not ask for subpoenas that would have enabled him to "cross-examine the reporting physicians" (402 U.S. at 404).

Moreover, Perales did not claim that the reports of the physicians had no "basis in evidence having rational probative value" (402 U.S. at 407), whereas the petitioner in this case claims that the medical reports by Dr. Fiertz, the Transit Authority's consulting neurologist, and by Dr. Behr, a Transit Authority employee, had "no basis in evidence having rational probative value". Consolidated Edison Co. v. NLRB, 305 U.S. 197, 230 (1938).

Petitioner also claimed that the reports by the Transit Authority's above-named doctors were contrary to the physical facts reported by other observers, and that they were inconsistent and self-contradictory. Such claims by the petitioner are discussed in subheading "B" herein.

Richardson v. Wright, 405 U.S. 208 (1972) -- also discussed in the District Court's decision herein -- withheld decision whether a recipient of Social Security disability benefits had a constitutional right to make an oral presentation to the Social Security Administration before it suspended or terminated payment of disability benefits to him. The Court said that new regulations adopted by the agency gave recipients of benefits a right to notice of proposed suspension or termination of disability benefits with reasons therefor, and an opportunity to submit rebuttal evidence; and the Court remanded the case for processing under the new regulations which may result in a determination not to suspend or terminate disability benefits, thereby making it unnecessary to decide the constitutional question.

In Mathews v. Eldridge, supra, 424 U.S. 319 (1975), the Court said:

> "If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician."

In this case, unlike the Eldridge case, supra, there was a sharp conflict between Dr. Fiertz's report that the petitioner had epilepsy of unknown origin, and the reports by Drs. Goodman

and Eisenberg, petitioner's neurologists, that the petitioner had a post-concussion syndrome caused by his injuries while working.

Dr. Fiertz's opinion was also contrary to a determination by the New York State Workmen's Compensation Board that petitioner's disability was caused by injuries he sustained at work as a patrolman employed by the Transit Authority.

The respondent took no action to resolve the conflict between the opinion of Dr. Fiertz, and the opinions of Drs. Goodman and Eisenberg, and the administrative determination of the Workmen's Compensation Board. Instead, the respondent accepted Dr. Fiertz's medical opinion and it based its determination thereon; and it gave no consideration or effect to the medical opinions of Drs. Goodman and Eisenberg, and to the administrative determination of the Workmen's Compensation Board.

In the Eldridge case, supra, the Court also said (424 U.S. at 345-346):

> "A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency."

In this case, unlike the Eldridge case, the respondent did not give the petitioner access to the reports of Drs. Fiertz, Equale, Fox, Oberman and Behr,

employed by the Transit Authority, before the respondent made its administrative determination denying the petitioner's application for accident disability retirement; and the petitioner had no opportunity to point out inconsistencies and contradictions in the reports of Drs. Fiertz and Behr, and to submit other reports in rebuttal thereto.

Frost v. Weinberger, 515 F.2d 57 (C.A. 2, 1975) -- cited in the District Court's decision -- decided that in a Social Security disability case:

> "a preliminary pre-reduction determination on papers to be followed by a full post-reduction hearing if requested, conform to the requirements of due process."

In this case, unlike the Frost case, supra, the respondent did not give the petitioner any kind of a hearing, before or after it made its administrative determination denying the petitioner's application for accident disability retirement benefits.

Section 74 of the New York Retirement and Social Security Law gives to members of that retirement system a statutory right to demand and to receive an administrative evidentiary hearing after the State Comptroller makes an administrative determination of an application for any retirement benefit, including accident disability retirement.

B. Risk of Erroneous Governmental Action

The medical reports on which the respondent based its administrative determination were unreliable, erroneous, and they lacked probative value.

Respondent's Medical Board based its determination that the petitioner did not receive his disabling injuries in line of duty as a Transit Patrolman upon the second report by Dr. Fiertz, its consulting neurologist, dated May 22, 1970, that "epilepsy is the most likely diagnosis" (48).

However, Dr. Fiertz's first report, dated October 31, 1969, contradicted his above-quoted diagnosis, and said (40):

> "He denies any history of * * * epilepsy * * *
> * * * * * *
> I am unable to give any definite explanation or reason for this blackout. I doubt that it is neurological in any way * * * ." (emphasis supplied)

Dr. Fiertz's above-quoted belated diagnosis of "epilepsy" was contradicted by Elmhurst Hospital's diagnosis of "Cerebral Concussion (history of unconsciousness)" (36); and it is also contrary to the diagnosis of "post concussion syndrome" made by Dr. Herman Goodman, one of petitioner's neurologists (46-47); and it is also contrary to the diagnosis of "cerebral concussion * * * post-traumatic seizure disorder", made

by Dr. David Eisenberg, another of petitioner's neurologists (49-50) and it is also contrary to the Workmen's Compensation Board determination that the petitioner "has continuing causal related disability" (35).

Dr. Fiertz's diagnosis of "epilepsy" is also contradicted by the four electroencephalograms of petitioner's brain, three of which showed normal brain waves, and the fourth showed "diffuse bilateral dysfunction", which indicate cerebral concussion, and contra-indicated "epilepsy", which is shown by "slow waves or spike-and-dome pattern or unspecific localization", according to Dr. Fiertz's report of May 22, 1970, which said that (48):

> "'convulsive disorder' is shown by '(slow waves or spike-and-dome pattern or unspecific location)'; and that 'Dysfunction' as such is useless for diagnostic purposes."

In his first report, dated October 31, 1969, Dr. Fiertz wrote: "He (the petitioner) does not know exactly how he fell" (40).

In his second report, dated May 22, 1970, Dr. Fiertz changed the above statement, and wrote that the petitioner had "two sudden blackouts" (48).

In contrast, Dr. Goodman wrote on May 18, 1970, that the petitioner "tripped and fell" down a flight of steps on October 2, 1969 (46).

The above cited medical and non-medical factual disputes whether the petitioner's fall while on duty on October 2, 1969, was caused by "epilepsy" or because he "tripped and fell" down a flight of steps, and whether his admitted disability was due to "epilepsy" which was not caused by an accident at work as a Transit Patrolman, or by "cerebral concussion * * * post-traumatic seizure disorder" as an aftermath of an accident at work when he "tripped and fell" while performing duty as a Transit Patrolman on October 2, 1969, gave the petitioner a procedural due process constitutional right to "some kind of hearing" to determine such factual disputes, before or after the respondent made its administrative determination denying the petitioner's application for accident disability retirement.

We noted previously that section 74 of the New York Retirement and Social Security Law gives to members of the New York State Employees' Retirement System a statutory right to demand and to receive an evidentiary administrative hearing before the State Comptroller, as administrator of such Retirement System, after he makes an administrative determination of an application for accidental disability retirement benefits, or for some other retirement allowance or benefit.

We submit that there is no valid reason why the respondent should not give a similar administrative evidentiary hearing to members of the New York City

Employees' Retirement System at their request.

In Lonzollo v. Weinberger, 534 F.2d 712, 714 (C.A. 7, 1975), after it closed an administrative evidentiary hearing, the administrative agency received and considered a doctor's report that there was no objective medical evidence to support the appellant's subjective complaints that he had pain and blackouts which prevented him from working. The Court annulled the administrative determination because it was based, in part, on the report of the doctor which was not received in evidence at the administrative evidentiary hearing. The Court said that:

> "the final decision was based in part on evidence not presented at that hearing, nor at any hearing as to which appellant had notice and an opportunity to present evidence in rebuttal."

C. The Government's Interest

The Retirement System, an agency of the City's government, like the petitioner, should be deemed to have an equal interest in having a factually and legally correct administrative determination made of a citizen's application for accident disability retirement.

Such interest should not be subordinated to considerations of fiscal economy where, as here, the record shows substantial factual disputes, and differences of medical opinion. It is only where "the

fairness and reliability of the existing * * * procedures" is not disputed in the record (Mathews v. Eldridge, 324 U.S. at 343), that an administrative determination of an application for disability benefits may be made without an evidentiary hearing. In the Eldridge case, supra, the Court said:

> "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." (424 U.S. at 348).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

June 2, 1977.

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Petitioner

APPENDIX

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of March one thousand nine hundred and seventy-seven.

Present: HON. IRVING R. KAUFMAN
Chief Judge
HON. JAMES L. OAKES
Circuit Judge
HON. FREDERICK vanPELT BRYAN
District Judge

Ronald Siletti,
Plaintiff-Appellant
v.

New York City Employees' Retirement System, and Melvin Goldstein, individually and as Executive Director of the New York City Employees' Retirement System,
Defendants-Appellees.

75-7575

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the plaintiff-appellant.

A. DANIEL FUSARO
Clerk

by
Vincent A. Carlin
Chief Deputy Clerk

In The

Supreme Court of the United States

October Term, 1976

No. 76–1715

RONALD SILETTI,

Petitioner,

–against–

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, and MELVIN GOLDSTEIN, individually, and as Executive Director of the New York City Employees' Retirement System,

Respondents.

SUPPLEMENTARY APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED SEPTEMBER 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RONALD SILETTI,

Plaintiff,

-against-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,

Defendant.

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75 Civ. 1364

MEMORANDUM
#43184

APPEARANCES:

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Attorney for Defendant
Of Counsel: A. MICHAEL WEBER, ESQ.

LASHER, D.J.

This is a civil rights action brought pursuant to 42 U.S.C. #1983 and 28 U.S.C. §1343(3)(4). Jurisdiction is predicated not only on §1343(3)(4) and the Fourteenth Amendment but on 28 U.S.C. §1331.

Siletti, a former patrolman in the New York City Transit Authority, was injured in 1969 when he fell down a subway station stairway. In 1970, he was retired on ordinary (non-service connected) disability benefits. Subsequently, his application for service connected disability retirement was denied by the defendant - New York City Employees' Retirement System (Retirement System). The defendant's determination was made pursuant to §B3-40.0 of the Administrative Code of the City of New York, which provides that an application for service connected disability can only be granted if a "medical examination and investigation" finds that the applicant was

> "physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of willful negligence on the part of such member and that such member should be retired...."

The plaintiff contends that had he been given an evidentiary hearing

on his application for service connected retirement, he would have been able to show that his disability was connected to his city-service, thus entitling him to a larger pension. The complaint seeks declaratory relief that, as applied, §B3-40.0 of the Administrative Code deprived the plaintiff of property without due process of law; monetary damages; and the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284.

In a motion to dismiss pursuant to Rule 12, Federal Rules of Civil Procedure, the defendant argues that the district court lacks jurisdiction; that the district court should abstain; that the complaint states facts insufficient to state a claim of deprivation of property without due process of law; and that a three-judge court should be convened.

In a cross-motion pursuant to Rule 19, Federal Rules of Civil Procedure, Siletti seeks to add Melvin Goldstein, Executive Director of the Retirement System, as a defendant.

Jurisdiction

The defendant first argues that federal district courts lack jurisdiction to review determination of state administrative agencies. Plainly the defendant has misconstrued the thrust of Siletti's complaint. Except as to his claim for money damages, Siletti does not seek a substantive review of the disability finding, but rather, challenges the procedures employed to reach that determination, cf. Goldberg

v. Kelly, 397 U.S. 254 (1970). Such a claim properly falls within the subject matter jurisdiction of the court. See, e.g., McClendon v. Rosetti, 460 F.2d 111 (2d Cir. 1972). The case relied on by the defendant to support its argument, Chicago R.I. & P.R. Co. v. Stude, 346 U.S. 574 (1954), is inapposite. There, in a diversity action, the petitioner was seeking a substantive review of an assessment of land pursuant to state condemnation proceedings; unlike the present case, no constitutional questions were raised.

However, to the extent that the complaint demands money damages, the plaintiff necessarily asks this court to review the substantive determination made by the Retirement System. To grant such relief would be premature, since even if Siletti were entitled to a new hearing with full rights of appearance and cross examination, we cannot assume that the Retirement System Tribunal will necessarily find his disability to be service connected. Accordingly, the motion to dismiss as to the prayer for monetary relief is denied without prejudice.

The defendant's reference to the existence of an "adequate state remedy" is apparently to be taken to mean that the court lacks jurisdiction because Siletti has failed to exhaust an available state judicial or administrative remedy. The argument is without merit. Claims premised on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) need not be predicated on exhaustion of state judicial or administrative remedies. Steffel v. Thompson, 415 U.S. 452, 472-73 (1974). Although

the Second Circuit continues to draw a distinction between state judicial remedies and adequate administrative remedies, see Plano v. Baker, 504 F.2d 595 (2d Cir. 1974; see also Blanton v. State University of New York, 489 F.2d 377 (2d Cir. 1973); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970), the distinction is of no assistance to the defendant in the absence of allegations that the plaintiff failed to exhaust an adequate administrative remedy. See also Powell v. Workmen's Compensation Board of the State of New York, 327 F.2d 131 (2d Cir. 1964).

Finally, as to Siletti's cross-motion to add a party defendant, the defendant Retirement System makes no objection. Accordingly, the plaintiff's cross-motion is granted. By naming Melvin Goldstein, individually and as Executive Director of the Retirement System, as a party defendant to this action, the plaintiff obviates the objection that the complaint fails to name as a defendant a "person" within the meaning of 42 U.S.C. §1983. Cf. Surowitz v. New York City Employees' Retirement System, 376 F.Supp. 369 (S.D.N.Y. 1974); Eisen v. Eastman, supra.

Accordingly, the defendant's motion to dismiss for lack of jurisdiction, with the exception of the plaintiff's claim for money damages, is denied.

Abstention

The defendant contends that, if this court finds subject matter jurisdiction to exist, it should nevertheless abstain

from a determination of the case. The position has no merit, since the case involves none of the recognized "exceptional circumstances," Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959), that justify abstention by a federal court. Moreover, although abstention is not altogether barred in a civil rights case (where jurisdiction is predicated on 28 U.S.C. §1343), see Harrison v. NAACP, 360 U.S. 167 (1959), the Second Circuit has nonetheless appropriately observed:

> "it is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention ... Indeed, the objections of the Civil Rights Act would be defeated if we decided that this federal claim grounded on an alleged violation of the federal constitution would have to stagnate in the federal court until some nebulous or nonexistent remedy was pursued like a will-o-the-wisp in the state court." Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967).

"Exceptional circumstances" justify abstention when there is an unresolved question of state law which, if definitively determined by state courts, will avoid or minimize the federal constitutional claims presented. Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, 498-499 (1941); Coleman v. Ginsberg, 428 F.2d 767, 769-770 (2d Cir. 1970); or where intervention by the federal courts would involve possible

"disruption of complex state administrative processes." Zwickler v. Koota, 389 U.S. 241, 249 n. 11 (1967). See Burford v. Sun Oil Co., 319 U.S. 315 (1943); Coleman v. Ginsberg, supra.

The case at hand, however, does not turn on any doubtful issue of state law. The meaning of the Code is plain on its face. The plaintiff does not ask for an interpretation of its meaning. Rather he challenges the procedures by which it is administered. Moreover, the fact that Siletti's claim might be resolved under the due process clause of the New York State Constitution is no ground for abstention. Stephens v. Tielsch, 502 F.2d 1360, 1362 (9th Cir. 1974); see Wisconsin v. Constantineau, 400 U.S. 433 (1971).

Nor is there merit to the defendant's argument that the court should abstain to avoid interference with a "complex" state administrative process. In making this contention the defendant relies heavily on Surowitz v. New York City Employees' Retirement System, supra, a case involving quite similar facts. There, Judge Pollack indicated that the controversy presented a "classic case for the invocation of the doctrine of abstention." Id. at 376. He characterized the regulations at issue in the present case as part of a "complex and comprehensive local regulatory scheme of great interest to the State of New York." Id. at 377. However, Surowitz is distinguishable in that the plaintiff there did not attack any state statute or regulation, either "on its face or in its operation." Id. at 373. Instead, the plaintiff alleged that state administrative and judicial

processes had unfairly delayed the adjudication of his retirement claim -- a question primarily relating to enforcement of local laws rather than constitutional issues. See Simmons v. Jones, 478 F.2d 321 (5th Cir. 1973).

Moreover, federal district courts have resolved due process challenges to comparable administrative proceedings without apparent disruption of the state administrative process. See, e.g., Snead v. Department of Social Services of the City of New York, 355 F.Supp. 764 (S.D.N.Y. 1973), vacated and remanded, 94 S.Ct. 2376 (1974); Kabelka v. City of New York, 353 F.Supp. 7 (S.D.N.Y. 1973).

Accordingly, the defendant's motion to dismiss this action on grounds of abstention is denied.

Three-Judge Court

The plaintiff seeks the convening of a three-judge court to hear his due process claim. The essence of the plaintiff's claim is that the provisions of the Administrative Code are constitutionally defective because they do not provide that a retiree be granted an evidentiary hearing as to whether his disability is service connected. Yet nothing in the provisions of the Administrative Code prevents the holding of an evidentiary hearing. The Code is neutral on the point and specifies only the medical and factual findings required to authorize the grant of an application for service incurred disability. The plaintiff's due process claim

is not an attack on a statute but on the operational procedures utilized by its administrators. In such circumstances the provisions of the three-judge court statute, 28 U.S.C. §§2281ff, do not apply. Finnerty v. Cowan, 508 F.2d 979, 984-985 (2d Cir. 1974) and Mills v. Richardson, 464 F.2d 995, 1000-1001 (2d Cir. 1972). Accordingly, the plaintiff's request for a three-judge court is denied.

Due Process

The plaintiff alleges (and it is not disputed) that the Retirement System's decision to deny his application for accident disability benefits was made

> "without holding a hearing of evidence under oath, and without giving the plaintiff an opportunity to present evidence under oath, and, instead, [the defendant] made the said determinations ex parte, and ... did not inform the plaintiff of the matters which [were] considered ... in making such determinations." (Complaint, ¶19).

It is argued that the absence of an adversary hearing deprived the plaintiff of property without due process of law.

The disability benefits at issue are entitlements created by statute for the benefit of persons meeting the specified qualifications. The Fourteenth Amendment's protection of property has been broadly read to expand protection to such entitlements. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 86 (1972);

Goldberg v. Kelly, supra, at 261-262. Procedural due process is therefore applicable to the disability retirement proceeding.

Are the procedures provided by the Retirement System constitutionally adequate? We are regularly reminded that what constitutes due process under a given set of circumstances depends upon the nature of the government proceeding involved and the rights that may be affected by that proceeding. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). The basic requirements of due process are "some kind of notice and ... some kind of hearing." Goss v. Lopez, 419 U.S. 565, 579 (1975). However, it does not follow that simply because due process is required in a disability retirement proceeding, a trial-like or adversary hearing is necessary. Cf. Frost v. Weinburger, 515 F.2d 57 (2d Cir. 1975); Kabelka v. City of New York, supra; Wright v. Finch, 321 F.Supp. 383 (D.D.C. 1971), vacated and remanded, Richardson v. Wright, 405 U.S. 208 (1972).

The plaintiff, in a memorandum in opposition to the motion to dismiss, relies on Goldberg v. Kelly, supra, particularly the general observation made in that case that in most settings where factual questions are presented, "due process requires an opportunity to confront and cross-examine adverse witnesses." 397 U.S. at 269. However, Goldberg dealt with welfare termination proceedings in which "credibility and veracity are at issue." Id. at 269. In the case at hand, by contrast, the

questions of credibility and lack of veracity by medical witnesses are not likely to arise. Indeed, although the plaintiff disputes the medical and factual conclusions reached by the defendant, he has not challenged the medical factfinder's credibility or fairness. In the absence of questions of credibility, other than the usual conflicting opinions of opposing medical experts, the plaintiff's interest in cross-examination is minimal. It is perhaps for these reasons that the Supreme Court in Richardson v. Perales, 402 U.S. 389, 406 (1971), has considered significant the "traditional and ready acceptance of the written medical report in social security disability cases."

Moreover, a critical factor underlying Goldberg was the desperate situation created by summary termination of a welfare recipient's financial assistance while the controversy over his eligibility remained unresolved: [h]is need to concentrate upon finding the means for daily subsistence ... adversely affects his ability to seek redress from the welfare bureaucracy." 397 U.S. at 264. The "brutal need" manifested in Goldberg is not present here where the plaintiff is regularly receiving disability benefits and seeks only to increase them.

Furthermore, the complaint does not specify, and it is difficult to conceive, just what the plaintiff can prove in an adversary hearing that he has been prevented from proving under existing procedures. Certainly nothing in his complaint indicates that the defendant barred him from "presenting

documentary or other evidence in his favor." Balash v. New York City Employees' Retirement System, 34 N.Y.2d 654, 355 N.Y.S.2d 577 (1974). Nor has the plaintiff been able to demonstrate that the written medical reports that informed the decision of the Retirement System were unreliable or lacked probative value, a possible reason for supplying an adversary proceeding.

Finally, although the government's interest in protecting its fiscal resources is never by itself decisive of due process claims, we cannot help but be cognizant of New York City's current financial problems. We hesitate to add to those burdens by requiring an apparently costly adversary hearing, see Page v. Celebreeze, 311 F.2d 757, 760 (5th Cir. 1963), in the absence of a clear showing that such an adversary hearing would be of value to the plaintiff or that the retirement proceeding was unfair.

Accordingly, summary judgment is granted in favor of the defendant on the issue of an adversary hearing. The defendant's request for costs and disbursements is denied.

In sum, the defendant's motion to dismiss for lack of jurisdiction is denied except as to Siletti's claim for money damages, as to which it is granted. The defendant's motion to dismiss on grounds of abstention is denied. The plaintiff's request to convene a three-judge court is denied. The plaintiff's cross-motion to add Melvin Goldstein as a party defendant is granted.

Since there are no disputed material facts, and since matters outside the pleadings have been presented and considered the district court grants summary judgment pursuant to Rule 12(b) and Rule 56, Federal Rules of Civil Procedure, in favor of the defendant on the issue of whether plaintiff was entitled to an adversary hearing.

It is so ordered.

Dated: New York, New York
September 30, 1975.

MORRIS E. LASKER
U.S.D.J.

CORRECTING MEMORANDUM TO THE OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 7, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1364
#43184

[Same Title]

CORRECTING MEMORANDUM

LASKER, D.J.

It has been brought to my attention since the filing of my Opinion in this case on September 30, 1975, that the last sentence of the first full paragraph on page 3, should read "is granted without prejudice to the plaintiff" instead of "is denied without prejudice."

The last sentence of the first full paragraph on page 3 of the Opinion filed September 30, 1975, is, therefore, amended to read as follows:

> "is granted without prejudice to the plaintiff."

Dated: New York, New York
October 7, 1975.

MORRIS E. LASKER
U.S.D.J.